“Give me your money, you tired, poor and huddled masses!”

On the introduction of application fees in U.S. asylum law

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On 29 April 2019, the President of the United States of America ordered new restrictions on asylum seekers. The restrictions include a fee for asylum applications. This BOFAX reflects on such a fee against the backdrop of the United States’ obligations under international refugee law, especially the 1967 Protocol relating to the Status of Refugees (1967 Protocol) to the 1951 Refugee Convention.

The President of the U.S. gave the order in a memo under the subject “Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System”. According to the memo, the restrictions are meant to “strengthen asylum procedures to safeguard [the US] asylum system against rampant abuse of [the] asylum process”. Allegedly, such protection is necessary due to a “crisis” or “national emergency” and the “strategic exploitation of […] humanitarian programs” that undermine the US’ security and sovereignty.

Reading the President’s memo against the backdrop of the U.S. administration’s overall approach to asylum, one might get the feeling that the new restrictions, particularly the introduction of an administrative fee, are meant to reduce the number of those who can effectively access and benefit from the U.S. asylum system. Under “purpose”, the memo for example states that the processing and caring for individuals travelling in larger groups and with children require “extensive resources”, which “pulls U.S. Customs and Border Protection personnel away from securing [the] Nation’s borders” and thus implies that these resources need to be freed up for the mentioned reasons.

How must the proposed restrictions be regarded under the 1967 Protocol to which the U.S. have acceded in 1968? Article 1 of the protocol obliges States parties to “apply articles 2 to 34 inclusive of the Convention to refugees” irrespective of whether they are also parties to the 1951 Convention, or – like the U.S. – they are not. Under these provisions, individuals who have a “well-founded fear of being persecuted” for one of the reasons listed in Article 1 (A) (2) of the 1951 Convention enjoy certain rights. Legally, the enjoyment of these rights does not depend on the formal recognition as a refugee. The UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status puts it aptly when it holds: “A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. […] He does not become a refugee because of recognition, but is recognized because he is a refugee.”

Moreover, in their seminal book on the Law of Refugee Status, James C. Hathaway and Michelle Foster, convincingly argue that the 1951 Convention has “no intention to withhold all refugee rights pending affirmative refugee status assessment”. They base their argument on the observation that only some of the rights from the 1951 Convention are granted to individuals “lawfully staying” within a state. Individuals meeting the refugee definition enjoy other rights from the 1951 Convention beforehand, as soon as they are under the respective state’s jurisdiction.

It is thus not permissible to withhold an individual seeking asylum or refugee status her rights by way of simply denying her access to the respective adjudication procedure. Hathaway and Foster rightfully call a reading that would allow for such conduct “perverse”. In consequence, even if an individual situation would not be adjudicated because the asylum seeker was unable to pay a fee, this would have only limited effect on her legal situation, namely only with regard to those rights that are granted to those “lawfully staying” in a state.

In conclusion, although the 1967 Protocol might not explicitly oblige states to conduct adjudication procedures, it is clear that the introduction of fees for asylum procedures must in no case lead to a situation in which refugees are denied their rights simply because they cannot afford being formally recognized. Given the oftentimes heavily limited financial means of people seeking refuge in a foreign country and the apparent purpose of the proposed restrictions, the danger of such denial of rights is real. The Attorney General and the Secretary of Homeland Security were given 90 days to implement the President’s ideas. It is crucial that they keep the demands of international rules in mind when they do so “in a manner consistent with applicable law” as the memo demands.

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